

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	No. 94-192-1
v.	:	
	:	(CIVIL ACTION
MIKE PEREZ	:	No. 00-4995)

**FINDINGS FACT, CONCLUSIONS OF LAW
AND ORDER**

HUTTON, J.

August 27, 2002

Currently before the Court is the Petitioner Mike Perez's Supplement to His Previously Filed Motion for Relief under 28 U.S.C. § 2255 (Docket No. 502), the Government's Response to Petitioner's Motion for Relief under 28 U.S.C. § 2255 (Docket No. 506), the Petitioner's Reply to Government's Response to Petitioner's Motion for Relief under 28 U.S.C. § 2255 (Docket No. 516), the Petitioner's Post-Hearing Memorandum in Supplemental Support of § 2255 Relief (Docket No. 545) and the Government's Submission from Evidentiary Hearing on Ground VIII of Petitioner's Claim for Relief under 28 U.S.C. § 2255 (Docket No. 544).

The Court heard oral argument from the parties on January 23, 2002 on Ground VIII of Plaintiff's Motion for Relief under 28 U.S.C. § 2255. Pursuant to 28 U.S.C. § 2255, the Court is required to "determine the issues and make findings of fact and conclusions of law" 28 U.S.C. § 2255; see also Solis v. United States, 252 F.3d 289, 294 (3d Cir. 2001). For the reasons

stated hereafter, the Court denies Petitioner Mike Perez's Motion for Relief under 28 U.S.C. § 2255 as to Ground VIII.

I. BACKGROUND¹

On February 23, 2001, Petitioner Mike Perez ("Petitioner") filed a Motion for Relief under 28 U.S.C. § 2255 challenging his 1997 trial and conviction in this Court of federal drug crimes. On July 31, 2001, this Court found that Petitioner was not entitled to relief on twelve of the thirteen grounds raised in the Motion. See United States v. Perez, 177 F.Supp.2d 342 (E.D. Pa. 2001). With regards to Petitioner's eighth ground for relief, however, the Court found that an evidentiary hearing was necessary to address the merits of Petitioner's claim. Id. at 350. In Ground VIII, Petitioner alleged that trial counsel F. Emmett Fitzpatrick, Jr. ("trial counsel" or "Mr. Fitzpatrick") was ineffective for failing to fully discuss plea bargaining opportunities with Petitioner. See Pet'r Supp. Mot. under § 2255 at 9. Specifically, Petitioner asserts that "[d]uring the pretrial stages, [Petitioner] was led to understand that he had two choices: either cooperate with the United States government and earn a cooperation departure . . . or go to trial." Id. According to Plaintiff, had Petitioner's "trial counsel more fully explained the guideline sentencing structure in federal drug cases, [Petitioner] would have much more seriously

¹ To the extent that the "Background" portion of this decision contains findings of fact and/or conclusions of law in addition to those set forth under such headings, these determinations are deemed to be part of the respective sections even if not expressly stated.

considered a plea bargain." Id. Moreover, Petitioner claims that his decision not to cooperate with the Government was based on the mistaken belief that he receive only a five-year sentence if convicted. See Pet'r Post-Hearing Mem. for § 2255 Relief at 5.

The Government counters that Petitioner has no grounds for the relief sought because Mr. Fitzpatrick's actions were reasonable and well within professional norms. See Gov.'s Submission from Evidentiary Hearing at 4. Specifically, the Government contends that the only plea offer extended required Petitioner to cooperate with the Government and testify against his Columbian suppliers. See id. "Trial counsel did ask the defendant if he wanted to cooperate [with the Government] . . . and the defendant clearly indicated that he did not." Id. Moreover, the Government contends that, based on the evidence of record, Petitioner's allegation that trial counsel advised him that Petitioner was responsible for only one kilogram of cocaine and therefore would only receive a five-year sentence "is utterly unbelievable." Id. Finally, the Government asserts that Petitioner is unable to meet the second prong of the Strickland test because Petitioner failed to demonstrate a "reasonable probability" that he would have cooperated with the Government and entered into a plea agreement. See id. at 7-8.

Based on the Evidentiary Hearing and all other evidence of record, the Court makes the following Findings of Fact and Conclusions of Law.

II. FINDINGS OF FACT

1. On May 3, 1994, Mike Perez ("Petitioner") was indicted for conspiracy to distribute cocaine (Count 1), distribution of cocaine (Counts 2, 3, and 4), unlawful use of a telephone (Counts 7-21), conducting financial transactions involving proceeds of unlawful activity (Count 23), and criminal forfeiture (Count 24).

2. Attorney F. Emmett Fitzpatrick, Jr. ("trial counsel" or "Mr. Fitzpatrick") represented Petitioner through trial and sentencing.

3. Prior to trial, Mr. Fitzpatrick met with Government lawyers to discuss the possibility of a plea bargain. (See Transcript, 1/23/2002, at 13).

4. The only plea offer extended by the Government to Petitioner was in exchange for Petitioner's cooperation. (See Transcript, 1/23/2002, at 13); see also Gov't Resp. to Pet'r Mot. for § 2255 Relief at 8.

5. Mr. Fitzpatrick asked Petitioner whether he wanted to cooperate with the Government, but Petitioner responded "quite clearly that he did not want to cooperate." (See Transcript, 1/23/2002, at 7; see also Transcript, 1/23/2002, at 20). Mr. Fitzpatrick did not thereafter encourage Petitioner to cooperate. (See Transcript, 1/23/2002, at 15, 22).

6. Since Petitioner wasn't willing to cooperate, the Government would not plea bargain. (See Transcript, 1/23/2002, at 13).

7. Mr. Fitzpatrick did not discuss with Petitioner the concept of plea bargaining outside the context of cooperation plea bargaining

because once Petitioner told him that he did not want to cooperate with the government, "that was the extent of what I believed at the time would be beneficial to him and if he didn't want to do that, that was it." (See Transcript, 1/23/2002, at 7-8).

8. Mr. Fitzpatrick never discussed how the Sentencing Guidelines might be applied in Petitioner's case. (See Transcript, 1/23/2002, at 12).

9. Ultimately, the Petitioner was tried on Counts 1, 3, 10, 11, 14, 15, and 23 of the indictment in a jury trial commencing on May 6, 1996.

10. Petitioner was tried with six co-defendants, all of whom were named as co-conspirators under Count One of the Indictment for the distribution of cocaine.

11. Various government cooperators, including Petitioner's girlfriend, testified at trial that Petitioner was engaged in transactions involving multi-kilogram cocaine transactions. (See Transcript, 1/23/2002, at 33).

12. Petitioner's decision not to cooperate with the government did not change even after a number of cooperators for the Government had testified. (See Transcript, 1/23/2002, at 14-15).

13. On November 20, 1997, following a guilty verdict, a sentencing hearing was held. The Court sentenced the Petitioner to a term of

imprisonment of 360 months, a five year term of supervised release, a fine of \$5,000, and a special assessment of \$350.²

14. Petitioner's claim that Mr. Fitzpatrick informed him that his sentencing exposure was five years based on one kilogram of cocaine is untenable, as is Petitioner's assertion that the first time he was aware that under the Sentencing Guidelines, he could potentially face a life sentence was when he received his Pre-Sentence Investigation Report ("PSI"). (See Transcript, 1/23/2002, at 21, 23).

15. Petitioner listened to and translated the Government's evidence, including tape recorded conversations, that discussed multi-kilogram quantities of cocaine. (See Transcript, 1/23/2002, at 28-29). Petitioner also heard numerous cooperating Government witnesses testify that Petitioner engaged in transactions involving multi-kilogram cocaine transactions. (See Transcript, 1/23/2002, at 33).

16. At the Evidentiary Hearing, the Court found that such evidence established "that there was an earlier times during the trial . . . when [Petitioner] was put on notice of the quantity of drugs involved in the prosecution [and] that he could have changed his mind then [about cooperating with the Government]." (See Transcript, 1/23/2002, at 29).

² Following the imposition of sentence, the Petitioner filed an appeal of his conviction and sentence to the United States Court of Appeals for the Third Circuit. On October 26, 1998, the United States Court of Appeals for the Third Circuit affirmed the judgment of the trial court. On October 4, 1999, the United States Supreme Court denied Petitioner's Writ of Certiorari.

17. Mr. Fitzpatrick did not suggest to Petitioner that he would receive a five-year sentence. (See Transcript, 1/23/2002, at 8-9). At the Evidentiary Hearing, Mr. Fitzpatrick credibly testified that it is his practice not to suggest what amount of time a defendant will receive. (See Transcript, 1/23/2002, at 9). He explained that "[t]he only thing that I discussed with people regularly back then and even today is, if you want to substantially cooperate, then the Government may be able to ask the Court to depart downward from the Guidelines. If you don't want to substantially cooperate, there's no way that I know it can be done." (See Transcript, 1/23/2002, at 9).

18. Petitioner is still uncertain today as to whether he would have cooperated with the Government and testified against his Columbian drug suppliers. (See Transcript, 1/23/2002, at 25).

19. Moreover, Petitioner refused to accept responsibility for the charges brought against him throughout the trial, during sentencing and even in his Motion for Relief under 28 U.S.C. § 2255 in which he reasserted his position that he was not the major drug dealer that the witnesses suggested. See Pet'r Supp. to § 2255 Mot. at 8; see also United States v. Perez, 177 F.Supp.2d 342, 349 (E.D. Pa. 2001).

20. In light of Petitioner's continued refusal to accept responsibility and his uncertainty as to whether he would have cooperate with the Government coupled with the Government's unwillingness to plea bargain without Petitioner's substantial

cooperation, any attempt by Mr. Fitzpatrick to negotiate a plea bargain would have been unsuccessful.

III. CONCLUSIONS OF LAW

1. Petitioner has failed to establish a violation of his Sixth Amendment right to effective assistance of counsel as set forth in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

2. A claim of ineffective assistance of counsel is governed by the standard set forth by the Supreme Court in Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984).

3. In order to prevail on a claim of ineffective assistance of counsel, a defendant must show that (1) their counsel's performance was defective under prevailing professional norms, and (2) that the deficient performance prejudiced the defense. See 466 U.S. at 687; see also United States v. Day, 969 F.2d 39, 42 (3d Cir. 1992).

4. Under the first prong of the Strickland test, counsel's performance will be measured against a standard of reasonableness. In analyzing that performance, the court should make "every effort . . . to eliminate the distorting effects of hindsight," and determine whether "in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." See Strickland, 466 U.S. at 690.

5. Under Strickland's second prong, the court must determine if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Id. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

6. Only after both prongs of the analysis have been met will the petitioner have asserted a successful ineffective assistance of counsel claim.

7. In his Motion for Relief under 28 U.S.C. § 2255, Petitioner alleged that trial counsel was ineffective for failing to fully explore plea bargaining opportunities with the Government. See Pet'r § 2255 Mot. at 9. "The plea bargaining stage is a critical stage with regard to the right to effective assistance of counsel." United States v. Barber, 808 F.Supp. 361, 378 (D.N.J. 1992), aff'd 998 F.2d 1005 (3d Cir. 1993).

8. During the plea bargaining stage, counsel's performance is ineffective if counsel fails to convey the plea bargain to his client or if counsel conveys such incorrect information that it undermines the defendant's ability to make an intelligent decision whether or not to accept the offer. See United States v. Day, 969 F.2d 39, 42-44 (3d Cir. 1992).

9. Thus, the burden is on Petitioner to "prove that the government actually extended a plea offer and must demonstrate a reasonable

probability that: (1) the defendant would have accepted the alleged plea offer, (2) the court would have accepted the plea agreement, and (3) a lesser sentence would have resulted." United States v. Pungitore, 15 F.Supp.2d 705, 733 (E.D. Pa. 1998) (citing Day, 969 F.2d at 44-45).

10. Mr. Fitzpatrick did not render ineffective assistance to Petitioner as a matter of law because the only plea offered by the Government required Petitioner's cooperation, Mr. Fitzpatrick discussed with Petitioner the possibility of his cooperating with the Government and Petitioner steadfastly refused to cooperate. His decision not to cooperate did not change throughout trial and sentencing.

11. Mr. Fitzpatrick acted within the bounds of reasonable prevailing professional norms when he did not pursue a plea bargain outside the context of cooperation. The evidence at bar conclusively reveals that the Government had no intention of offering such plea.

12. "An attorney is not obligated to initiate plea discussion with the government in every case." United States v. Turchi, 645 F.Supp. 558, 567 (E.D. Pa. 1986), aff'd 815 F.2d 696 (3d Cir. 1987), cert. denied 484 U.S. 912, 108 S.Ct. 257, 98 L.Ed.2d 214 (1987). Moreover, whether or not to open plea discussion with the Government "is a strategic decision ordinarily not second-guessed

by a reviewing court." Castranovo v. United States, Civ. A. No. 97-3781, 2000 WL 222859, at *4 (S.D.N.Y. Feb. 10, 2000).

13. The evidence of record conclusively demonstrates that the Government would not have accepted a plea without Petitioner's substantial cooperation and testimony against his Columbian drug suppliers.

14. Moreover, Petitioner has presented no evidence that he would have accepted a plea which involved cooperation.

15. Furthermore, "Petitioner cites to no cases within the Third Circuit where a lawyer has been found to be ineffective for failing to take steps to persuade a client to plead guilty." United States v. Pungitore, 15 F.Supp.2d 705, 733 (E.D. Pa. 1998).

16. Petitioner has also failed to establish the requisite prejudice to justify his claim for relief. Specifically, Petitioner has failed to show that had Mr. Fitzpatrick discussed plea bargaining outside of the cooperation context or explained to Petitioner how the Federal Sentencing Guidelines worked that Petitioner would have received a lighter sentence.

17. The instant case is similar to Castranovo v. United States, Civ. A. No. 97-3781, 2000 WL 222859 (S.D.N.Y. Feb. 10, 2000), in that the Government

had little to gain by offering [Petitioner] a plea bargain; it still had to present the same evidence against numerous other defendants. Moreover, . . . the government's position was that he was a major figure in a conspiracy. Thus it would have been improbable that the government would have accepted a plea that did not

entail a conviction for a continuing criminal enterprise and its concomitant sentence.

Castranovo, 2000 WL 222859, at *5.

18. Moreover, because the Court has credited the testimony of Mr. Fitzpatrick that he did not inform Petitioner that Petitioner was facing a five-year sentence if convicted, Petitioner is unable to demonstrate that "the advice . . . he received was so incorrect and so insufficient that it undermined his ability to make an intelligent decision about whether to accept the [plea] offer." Day, 969 F.2d at 43. This Court has found that there was no affirmative misrepresentation by trial counsel as to the maximum sentence the defendant faced if convicted.

19. Finally, the evidence of record demonstrates that Petitioner was unlikely to qualify for a decrease in offense levels for acceptance of responsibility since he continued to deny the extent of his involvement in drug trafficking even on collateral review.

20. Therefore, Petitioner has failed to show a reasonable probability that, but for Mr. Fitzpatrick's decision not to pursue of plea outside the context of cooperation and failure to discuss the sentencing guidelines, Petitioner's sentence would have been different.

21. Accordingly, the Court finds that Petitioner's claim that his counsel was ineffective at plea bargaining is without merit.

An appropriate Order follows.

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UNITED STATES OF AMERICA	:	CRIMINAL ACTION
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MIKE PEREZ	:	No. 00-4995)

O R D E R

AND NOW, this 27TH day of August, 2002, upon consideration of Petitioner Mike Perez's Supplement to His Previously Filed Motion for Relief under 28 U.S.C. § 2255 (Docket No. 502), the Government's Response to Petitioner's Motion for Relief under 28 U.S.C. § 2255 (Docket No. 506), the Petitioner's Reply to Government's Response to Petitioner's Motion for Relief under 28 U.S.C. § 2255 (Docket No. 516), the Petitioner's Post-Hearing Memorandum in Supplemental Support of § 2255 Relief (Docket No. 545) and the Government's Submission from Evidentiary Hearing on Ground VIII of Petitioner's Claim for Relief under 28 U.S.C. § 2255 (Docket No. 544), IT IS HEREBY ORDERED THAT

(1) Petitioner's Motion for Relief under 28 U.S.C. § 2255 as to Ground VIII is **DENIED**;

(2) Petitioner's Motion for Relief under 28 U.S.C. § 2255 is **DISMISSED WITH PREJUDICE**.

IT IS FURTHER ORDERED that a certificate of appealability is not granted because Petitioner has not made a substantial showing of the denial of a Constitutional right.

BY THE COURT:

HERBERT J. HUTTON, J.